Supreme Court, U.S.
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No. 96-264

In The

Supreme Court of the United States

October Term, 1995

STATE OF MONTANA,

Petitioner,

v.

MATTHEW C. FULLER,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Has a defendant, under a reasonable belief that his probation could be revoked if he invoked his right to remain silent, been compelled by the state to incriminate himself in violation of his constitutional rights when he makes self-incriminatory statements as a mandatory condition of court-ordered outpatient treatment and the statements are then used against him in a separate, independent criminal proceeding?

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RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the provision cited by Petitioner, the following is relevant:

Mont. Const. article II, section 25:

Self-incrimination and double jeopardy. No person shall be compelled to testify against himself in a criminal proceeding. . . .

Additional relevant Montana statutes are set forth in the Appendix.

STATEMENT OF THE CASE

The parties submitted this case to the state district court and, on appeal from a denial of a motion to dismiss the charging document, to the Montana Supreme Court on an agreed statement of facts. No other facts were considered by the court on appeal.

Matthew Fuller was charged in 1992 with three counts of attempted sexual assault.[1] He was convicted following a one-day bench trial.[2] Under state law, Fuller could have been sentenced to a minimum term of no less than two years on each count unless the sentencing court

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[1] Sections 45-4-103 MCA and 45-5-502(3) MCA.

[2] Fuller appealed his conviction to the Montana Supreme Court and his conviction was reversed on September 15, 1994. *State v. Fuller* 880 P.2d 1340 (1994).

Petitioner incorrectly states that the trial was by a jury. Pet. 2.

found that treatment of the defendant in the local community afforded a better opportunity for rehabilitation of the defendant and for the ultimate protection of society.[3] The sentencing judge made this finding and Fuller was sentenced to three concurrent terms of ten years in prison. The sentences were suspended upon the performance of certain conditions, including the condition that Fuller "shall obtain and/or continue his enrollment and participation" in an outpatient sexual offender treatment program. He was to follow "all policies of that program" and was not to terminate from the program without approval of his supervising officer. The sentencing order provided that should conditions of his probation be violated, a bench warrant would be issued and the defendant would be brought before the court for further proceedings.[4] A court-ordered sexual offender evaluation had been completed and provided to the court prior to sentencing.

Fuller was accepted into a treatment program which would not accept a patient who was in denial about his sexual problem or who did not honestly disclose his offending history. Further, patients who were in denial, who did not honestly disclose their offending histories, who re-offended during treatment, or otherwise violated the rules of the program were terminated from treatment.

Program employees had a duty imposed by state law to report to the proper authorities any evidence they

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[3] Sections 45-5-502(3) MCA and 46-18-222(6) MCA.

[4] As part of the order Fuller was also required to register as a sex offender under the then existing Montana statute. No issue is presented to the court respecting that requirement.

possessed in their official capacity that a child had been abused.

After admission, and as required by the program, Fuller revealed that he had sexually assaulted three minor girls in late 1992. The State of Montana incorrectly alleges that Fuller failed to comply with the program rules because he failed to make these disclosures as part of the evaluation process. The agreed statement of facts does not support this representation. Although the stipulated facts state Fuller did not disclose these incidents during his evaluation, it would be a mistake to assume that he did so without the knowledge of his therapist or that he did so to manipulate the system as alleged by the Petitioner. The sentencing court found that Fuller could be treated in the community based upon the sexual offender evaluation. Since the program did not accept individuals who denied the existence of a problem, it is reasonable to assume that the therapist was satisfied he had sufficient information to make his determination.

As he was also required to do, Fuller made the disclosures in writing. Copies of these documents were kept at his residence in Roundup, Montana.

Some time after the disclosures, Fuller's therapists wrote to one of his probation officers and questioned continuance of Fuller in the program for reasons other than the disclosures.[5] Because of the letter, one of the probation officers directed law enforcement in Roundup, Montana to conduct a search of Fuller's residence for

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[5] Appellant's Brief, Montana Supreme Court, Ex. F.

pornographic materials, videos, and written materials.[6] This search uncovered Fuller's writings which revealed details of the assaults, the first names and ages of the three girls as well as their addresses as of October 1992.

After he received these documents from law enforcement and at the direction of the local prosecutor, another probation officer turned the information over to the police.[7] The police located the girls named and obtained statements. Prior to the receipt of the written documents from the probation officer, the police department had absolutely no knowledge of these incidents[8] and had not pursued any independent investigation.

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[6] As a condition of his probation, Fuller was required to submit to reasonable searches of his person, residence and vehicle. Fuller, at the State court level, did not question the validity of the search clause, nor the validity of the search because it was conducted by someone other than his probation officer.

[7] The Petition at page 2 asserts that the disclosures were reported to the authorities by the therapists. On April 14, 1994 Fuller's therapists wrote a letter (Appellant's Brief Montana Supreme Court Ex. G) to Probation and Parole detailing the events set forth in their March 30th letter and informing probation about the disclosures. While it may be technically correct that the authorities were notified of the disclosures by the therapists the only information the police initially received were the documents seized during the search of Fuller's room. The letter dated April 14, 1996 was not turned over to the police and the police investigation of the incidents was predicated upon Fuller's written disclosures made during treatment.

[8] After the three (3) girls were assaulted and after Fuller had been charged initially in 1992 with three counts of attempted sexual assault, the girls reported the incidents to their families and the father of one of the girls called authorities to report the girls had been assaulted by someone known only

Fuller was subsequently charged with one (1) count of sexual intercourse without consent and two (2) counts of sexual assault.

After he was charged, Fuller moved at the State Court level to suppress his statements because his admissions were compelled in violation of his right against self-incrimination and he also moved the District Court to suppress the statements of the three girls on the basis of *Wong Sun v. United States* 371 U.S. 471 (1963). Fuller's motion to suppress his statements was denied and Fuller entered a guilty plea to the three charges, reserving his right to appeal the court's denial of his motion.[9] On appeal the Montana Supreme Court reversed the lower court's judgment. *State v. Fuller* 915 P.2d 809 (1996).

The majority opinion of the court emphasized that "resolution of Fuller's appeal will rest on Article II, Section 25 of the Montana Constitution, as well as the United States Supreme Court's interpretation of the Fifth Amendment." Pet. App. 5a. The majority concluded Fuller was faced with a "classic penalty situation" as described by this Court in *Minnesota v. Murphy*, 465 U.S. 420, 435 (1984). Unlike the factual situation addressed in *Murphy*, however, the majority concluded that Fuller's statements were compelled, even in the absence of an invocation of his right not to incriminate himself because he was forced by the court's treatment order to either

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to them at the time as "Matt". The father's call was transferred to three different departments and he eventually hung up the phone, feeling he was getting no assistance. No facts regarding the incidents were given to authorities at that time. Pet. App. 6b.

[9] Section 46-12-204(3) MCA.

make incriminating statements or remain silent and jeopardize his conditional liberty. While a prior state supreme court decision[10] precludes authorities from revoking one's probation based upon a refusal to admit guilt for a crime, the majority found, based on the facts, that Fuller had an "eminently reasonable" belief that the court would carry out its threat to revoke his probation if he did not obey its order to comply with the program's policies. The majority noted in conclusion that while it had addressed application of the Fifth Amendment, "this holding is also based separately and independently on Fuller's right to remain silent pursuant to Article II, Section 25 of the Montana Constitution." Pet. App. 17a. Two justices, agreeing entirely with the majority opinion, noted separately in a concurring opinion that, in their view, the state constitutional provision applied. Pet. App. 19a.

Three justices dissented because they concluded that Fuller was not presented with a "classic penalty situation," as the court would have been barred by state law from revoking his probation and sentencing him to prison if Fuller invoked his right and did not disclose his prior offense history. Pet. App. 26a-39a.

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[10] *State v. Imlay*, 813 P.2d 979 (1991), *cert. granted sub.nom. Montana v. Imlay*, 503 U.S. 905 (1992); *cert. denied as improvidently granted*, 113 S.Ct. 444 (1992) (*per curiam*).

REASONS FOR DENYING THE PETITION

I. THERE IS AN ADEQUATE AND INDEPENDENT STATE GROUND FOR THE DECISION OF THE MONTANA SUPREME COURT.

The majority opinion of the Montana Supreme Court stated that, even though considerable attention had been given to the United States Constitution in discussion of the issue presented, the decision was based "separately and independently" upon the applicable section of the Montana Constitution.

In *Michigan v. Long* 463 U.S. 1032, 1040-41 (1983) this court held that when a state court decision appears to rest primarily upon federal law or to be interwoven with federal law and when the adequacy and independence of the state court decision is not clear from the face of the opinion, this court will assume that the most reasonable explanation for the state court's decision is that the state court felt that federal law required it to rule in the manner it did.

This Court also held that it will not accept jurisdiction if the state court has merely relied upon federal authorities as it would upon case authority from other jurisdictions and the state court expressly states it is relying upon bona fide, separate and independent state grounds.

The fact that the Fifth Amendment and Montana's Article II, Section 25 are nearly identical does not automatically lead to a conclusion that the Montana Court based its decision upon the Fifth Amendment as opposed

to its own interpretation of its own constitutional provision. *Minnesota v. National Tea Company* 309 U.S. 551 (1940). The power of this court is to correct state judgments when they incorrectly adjudge federal rights. *Herb v. Pitcairn* 324 U.S. 117 (1945).

In this case, the Montana Supreme Court clearly stated it based its decision separately and independently upon Article II, Section 25 of the Montana Constitution. While the opinion does not contain a statement that the court is relying upon federal authority only for the purpose of guidance, such a statement clearly is not necessary since the Montana Court did not follow the decision in *Murphy*. Rather than follow the decision in *Murphy*, the Montana Supreme Court held that the facts present in *Murphy* were so dissimilar to those in *Fuller* to command a different result. The fact the Montana Supreme Court factually distinguished *Fuller* clearly indicates the Montana court did not feel required to follow *Murphy* and grounded its decision upon state law.

The Montana Court stated "[T]his court's decision is supported by the United States Supreme Court's interpretation . . . " Pet. App. 12a and not that the decision was controlled by such interpretation. This statement shows the Montana Supreme Court relied upon *Murphy* and the Fifth Amendment for evaluative purposes only and not as controlling authority.

II. THE QUESTION PRESENTED BY THE PETITIONER HAS NO BASIS IN THE DECISION OF THE MONTANA SUPREME COURT.

The question presented was not decided by the Supreme Court of Montana and provided no basis for its decision.

The question posed by Petitioner is premised on the inaccurate representation that a person serving a probationary sentence *voluntarily* enters a sexual offender treatment program as a condition of probation. Petitioner repeatedly asserts that there was an offer of leniency and that Fuller entered into "an arrangement", or was party to some type of agreement, when he was sentenced. At sentencing, the State asked for a total of eighteen years in prison.[11] Although Fuller at sentencing asked the court for a suspended sentence, that certainly cannot be classified as an agreement or arrangement. The state trial court ordered Fuller to successfully complete the treatment program. If he did not complete the program, an arrest warrant would be issued and his probation would be revoked.[12]

Petitioner's first ground for issuance of a writ is predicated upon its argument that there was some sort of

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[11] Tr. of sentencing hearing p. 194.

[12] Under Montana law, since treatment in a community based treatment program is the only way a defendant can avoid a mandatory minimum prison sentence, termination from a treatment program would automatically lead to revocation of a suspended sentence and incarceration. *Fuller* differs from *Murphy* in that Murphy did not face automatic revocation under Minnesota law. *Murphy* 465 U.S. at 438.

agreement. The cases cited by the Petitioner are factually and doctrinally inapposite to the facts and issues in this case.

The question presented provided no basis for the lower court's decision, or for the stipulated facts upon which this case was presented below. This is not an appropriate case for exercise of the writ of *certiorari*.

III. THE MONTANA SUPREME COURT DID NOT ERR IN ITS ANALYSIS OF *MINNESOTA V. MURPHY*.

The Montana Supreme Court did not misinterpret this Court's holding in *Minnesota v. Murphy*. The Petitioner's complaint about the Montana Supreme Court's decision is not so much with the manner in which the Montana court interpreted *Murphy* as it is with the way the court applied *Murphy* to the facts.

This court historically has been reluctant to grant review in cases in which the federal law or rule has been correctly interpreted by the State court but, perhaps, misapplied. Rule 10 Rules of the Supreme Court provides, in part, "[A] petition . . . is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."; See also *Minnesota v. Olson* 495 U.S. 89, 100 (1990) ("We are not inclined to disagree with this fact-specific application of the proper legal standard.") ("I interpret the last two paragraphs of Part III as deference to a state court's application of the exigent circumstances test to the facts of this case, and not as an endorsement of that particular application of the standard. . . . " Kennedy, J., concurring

at 403 U.S. 102.) *Zacchini v. Scripps-Howard Broadcasting Co.* 433 U.S. 562, 566, (1977) (" . . . our power is to correct wrong judgments, not to revise opinions.").

A few courts have decided issues identical to the one presented here and, with the exception of one court, have adopted position startlingly similar to that of the Montana Supreme Court.[13] The similarity in rationale between the courts demonstrates the Montana court did not misinterpret *Murphy* and that a conflict of jurisdictions does not exist.[14] Supreme Court Rule 10.1 provides a writ will be granted " . . . only when there are special and important reasons therefor."

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[13] See Pet. 11 n. 2. *State v. Tenbusch* 886 P.2d 1077 (Or. Ct. App., 1994) is the only case cited which ruled contrary. The *Tenbusch* ruling was by the Oregon Court of Appeals. Review of that decision was denied on February 28, 1995. *Husske v. Commonwealth* 448 S.E.2d 331 (Va. Ct. App., 1994), opinion vacated without opinion 462 S.E.2d 120 (Va. Ct. App., 1995) is presently before the Virginia Supreme Court, Record No. 95-1880.

[14] *Mace v. Amstoy* 765 F. Supp. 847, 851 (1991) ("The instant case is distinguishable from *Murphy*. The condition of petitioner's probation, as interpreted, did go beyond a prohibition against falsehood. It actually required admission of sexual intercourse – a criminal act for which petitioner could be prosecuted. . . . "); *Gyles v. State* 901 P.2d 1143, 1149 (Alaska, 1995) ("As the Vermont Supreme Court recently held: 'If the questions asked of a probationer call for answers that would incriminate him in a pending or later criminal prosecution, the State will have created the classic penalty situation if it asserts, either expressly or by implication, that an invocation of the privilege would result in probation revocation.' " *State v. Eccles* 877 P.2d 799, 801 (Ariz., 1994) ("The state may not force defendant to choose between incriminating himself and losing his probationary status by remaining silent. . . . ").

The state invites this Court to "clarify" *Murphy* because, it suggests, its then-attorney general misunderstood the case when he argued in another case before this Court that a probationer in Montana would enjoy immunity from prosecution for incriminating statement made during court-ordered therapy. Pet. 9 n. 1. It is patently obvious, however, that the previous attorney general was correct.

Murphy provides as follows:

> Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's 'right to immunity as a result of his compelled testimony would not be at stake,'. . . .

Murphy 465 U.S. at 435-36 n. 7 (citations omitted.)

The Montana Supreme Court did not misread *Murphy* in this regard. The court noted the State may insist upon answers to incriminating questions, but it must also realize that it may not use those compelled answers against a defendant in a later criminal proceeding. Pet. App. 17a.

Nor did the Montana Supreme Court misread *Murphy* with respect to its analysis of how a State creates the "classic penalty situation". *Murphy* held the classic penalty situation is created by a state if it asks incriminating questions and expressly or by implication threatens to revoke probation if the defendant asserts his right against self-incrimination. In that instance, assertion of the right

is excused and the compelled answers cannot be used against the probationer in a later criminal prosecution. *Murphy* 465 U.S. at 435.

The Petitioner incorrectly states at page 11 that critical to the holding of *Murphy* was the finding that a sanction for assertion of the right against self-incrimination had actually been imposed. The impermissible action of the state is a threat to punish a defendant for invocation of the right against self-incrimination. *Murphy* 465 U.S. at 435. The Montana Supreme Court clearly recognized this. Pet. App. 9a and 11a.

Whether state intends to follow through upon a threat or whether they would be successful if they attempted to follow through upon the threat are immaterial in determining whether the classic penalty situation has been created. *Gardner v. Broderick* 392 U.S. 273, 279 (1968) (". . . the mandate of the great privilege against self-incrimination does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment."); *Murphy* 465 U.S. at 444 ("The State's attempt to coerce self-incriminating statements by promising to penalize silence is itself constitutionally offensive. . . . ") (Marshall, J., dissenting.)

The privilege extends to disclosures a defendant reasonably believes could be used against him in a subsequent criminal proceeding.

The specific holding in *Murphy* was that the State of Minnesota did not create the classic penalty situation because it did not require Murphy to choose between making incriminating statements and jeopardizing his

conditional liberty by remaining silent. *Murphy* 465 U.S. at 436. Recognizing the validity of that holding, Pet. App. p. 16a, the Montana Supreme Court made a determination that the facts in *Fuller* led it to reach a different conclusion in the state case then before it. The Montana Supreme Court's conclusion below was nothing more than a fact specific application of *Murphy* to the case before it. The Court found that the questions asked Fuller were specifically directed at him to obtain incriminating information whereas the questions asked Murphy were more general. The Montana Court made a factual determination, based on the stipulated facts, that unlike the questions posed in *Murphy*, the situation confronting Fuller "call[ed] for answers that would incriminate him in a pending or later prosecution." *Fuller*, citing *Murphy*, Pet. App. 14a.

IV. THE DECISION OF THE MONTANA SUPREME COURT PROMOTES EFFECTIVE IMPLEMENTATION OF THE STATE OF MONTANA'S POLICY REQUIRING TREATMENT OF SEX OFFENDERS.

The Petitioner alleges that this court should grant its request because the decision of the Montana Supreme Court effectively prevents the State of Montana from being able to protect the public safety (Pet. 14) and the use of community based treatment facilities will be threatened. Should this decision be allowed to stand, Petitioner argues prosecutors will be unable to protect public safety when it is in danger. (Pet. 14) They argue the Montana Supreme Court has granted use immunity to offenders once they are in treatment thereby destroying the State's " . . . ability to act later in the interests of

public safety" (Pet. 14), for example, when the offender is "actively reoffending" or discloses additional offenses.

Murphy recognizes immunity must be given when the State insists upon answers to the most incriminating questions. *Murphy* 465 U.S. at 435-36 n. 7. However, immunity would not extend to offenses committed by the defendant while he was in treatment or offenses committed by him after sentencing. The only answers that are compelled are answers concerning sexual offending history.

The argument by the Petitioner overlooks, also, the fact the State is not completely precluded from prosecuting the defendant for crimes that occurred in the past if it can demonstrate that the crimes would have been discovered inevitably, that the State's knowledge came from an independent source and investigation has been continuing or that any taint caused by the compelled disclosures has been attenuated by the passage of time.[15] See also the concurring opinion of Trieweiler, J. at Pet. App. 24a.

Petitioner's stance further overlooks the manner in which a treatment program functions. It is reasonable to

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[15] Petitioner in this case took exactly this position at the District Court level in response to Respondent's motion filed after the Montana Supreme Court's opinion to suppress the statements of the three girls under the doctrine of *Wong Sun v. United States*. See State of Montana's Response to Defendant's Motion to Dismiss Case and Release Defendant.

assume that a therapist, given the hypothesis the Petitioner fears, would terminate a defendant from the treatment program and public safety could, at the very least, be protected by the use of revocation proceedings.[16]

At the bottom of page 8, Petitioner suggests it should be given the absolute power " . . . to use the threat of probation revocation for assertion of the privilege if it is to administer its treatment programs." This suggestion directly contradicts *Murphy*.

Montana has recognized the necessity of honest disclosures in order for there to be admission to a treatment program and for the programs to be effective. (Pet. App. 23a) It is difficult to comprehend how effective a treatment program could be if a defendant were forced to admit past crimes without immunity, thereby exposing himself to punishment not only for the current offense, but, also, for offenses in the past.[17]

In cases involving sexual crimes committed against minor children, Montana law requires that an evaluation be conducted and that evaluation contain a recommendation for treatment.[18] Without an evaluation and barring

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[16] In this case, exactly that happened. The defendant violated certain conditions of the program and a letter was sent to the probation department advising them of this fact. The State thereupon took measures to petition for revocation of his sentence which the court did do, sentencing the defendant to ten years in prison. See Pet. App. 4b.

[17] Section 45-1-205(1)(b) MCA provides that the statute of limitation for sexual offenses committed against minor children is five years after the date the child attains the age of eighteen.

[18] Section 46-18-111 MCA.

acceptance into a community treatment program, a defendant faces mandatory prison time.[19]

Montana has established the above policy by statute. The Petitioner's position – everyone who enters a program can be charged with what they admit to and can be punished for assertion of the privilege – thwarts this policy. If an offender were required to admit past sexual offenses, with no promise of immunity for those offenses, which offender would take the chance he/she might be prosecuted for both present and past offenses? If disclosures of criminal conduct during the evaluation and/or treatment process can be used by a prosecutor at his discretion to file further criminal charges, the effectiveness of any treatment program will be jeopardized.

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[19] Sections 45-5-502(3) MCA, 46-18-201(5) MCA, 46-18-222(6) MCA.

CONCLUSION

For the reasons above, it is respectfully submitted that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

Montana Code Annotated § 45-1-205(1). General time limitations. (1) (a) A prosecution for deliberate, mitigated, or negligent homicide may be commenced at any time.

(b) A prosecution under 45-5-502 through 45-5-505, 45-5-507, 45-5-625, or 45-5-627 may be commenced within 5 years after the victim reaches the age of 18 if the victim was less than 18 years old at the time that the offense occurred.

Montana Code Annotated § 45-4-103. Attempt. (1) A person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense.

Montana Code Annotated § 45-5-502. Sexual assault. (3) If the victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault the offender should be imprisoned for a term of not less than 2 years or more than 40 years and may be fined not more than $50,000.

Montana Code Annotated § 46-12-204. Plea alternatives. (3) With the approval of the court and the consent of the prosecutor, a defendant may enter a plea of guilty, reserving the right, on appeal from the judgement, to review the adverse determination of any specified pretrial motion. If the defendant prevails on appeal, the defendant must be allowed to withdraw the plea.

Montana Code Annotated § 46-18-111. Presentence investigation – when required. (1) Upon the acceptance

of a plea or upon a verdict or finding of guilty to one or more felony offenses, the district court shall direct the probation officer to make a presentence investigation and report. The district court shall consider the presentence investigation report prior to sentencing. If the defendant was convicted of an offense under 45-5-502, 45-5-503, 45-5-504, 45-5-505, 45-5-507, 45-5-625 involving a victim who was less than 16 years of age when the offense was committed, the investigation must include an evaluation of the defendant and a recommendation as to treatment of the offender in the least restrictive environment, considering community safety and offender needs. The evaluation must be completed by a person who is determined to be qualified under guidelines established by the department of corrections. All costs related to the evaluation must be paid by the defendant. If the defendant is determined by the district court to be indigent, all costs related to the evaluation are the responsibility of the district court and must be paid by the county or the state, or both, under Title 3, chapter 5, part 9.

(2) Unless the court makes a finding that a report is unnecessary, a defendant convicted of any offense not enumerated in subsection (1) that may result in incarceration for 1 year or more may not be sentenced before a written presentence investigation report by a probation officer is presented to and considered by the district court. The districts court may, in its discretion, order a presentence investigation for a defendant convicted of a misdemeanor.

Montana Code Annotated § 46-18-201. Sentences that may be imposed.

(5) Except as provided in 45-9-202 and 46-18-222, the imposition or execution of the first 2 years of a sentence of imprisonment imposed under the following sections may not be deferred or suspended: 45-5-103, 45-5-202(3) relating to aggravated assault, 45-5-302(2), 45-5-303(2), 45-5-401(2), 45-5-502(3), 45-5-503(2) and (3), 45-9-101(2), (3), and (5)(d), 45-9-102(4), and 45-9-103(2).

Montana Code Annotated § 46-18-222 (6). (Effective July 1, 1997) Exceptions to mandatory minimum sentences and restrictions on deferred imposition and suspended execution of sentence. All mandatory minimum sentences prescribed by the laws of this state and 46-18-219 and the restrictions on deferred imposition and suspended execution of sentence prescribed by 46-18-201(5) through (7), 46-18-221(3), 46-18-224, and 46-18-502(3) do not apply if:

(6) the offense was committed under 45-5-502(3) and the court determines that treatment of the defendant in a local community affords a better opportunity for rehabilitation of the defendant and for the ultimate protection of the victim and society, in which case the court shall include in its judgment a statement of the reasons for its determination.